

Pietrovito
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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Midwest Ophthalmic Instruments, Inc.--
Reconsideration

File: B-241329.3

Date: May 21, 1991

Michael J. Carroll for the requester.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Request for reconsideration of prior decision, in which the General Accounting Office found nonresponsive the requester's bid because unsolicited descriptive literature submitted with the bid showed that the offered product would not comply with a material invitation for bid (IFB) requirement, is denied where the requester does not dispute that the descriptive literature showed that the offered product did not comply with the IFB requirement.

DECISION

Midwest Ophthalmic Instruments, Inc. requests that we reconsider our decision in Marco Equip., Inc.; Scientific Supply Co., B-241329; B-241329.2, Jan. 31, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 107, in which we sustained the protest of Marco Equipment, Inc. challenging the responsiveness of Midwest Ophthalmic's bid under invitation for bids (IFB) No. DAKF15-90-B-0043, issued by the Department of the Army for automatic eye refractors.

We deny the request for reconsideration.

In our prior decision, we found that unsolicited literature submitted with Midwest Ophthalmic's bid showed that the product offered by Midwest Ophthalmic was not compliant with a

material IFB requirement. We recommended that the Army terminate Midwest Ophthalmic's contract for the convenience of the government and consider for award the bid of Marco, the next low bidder.^{1/}

Midwest Ophthalmic complains that our decision was not based upon the capabilities of its offered product but upon the unsolicited literature that accompanied its bid, which Midwest Ophthalmic states that the Army "informally" advised Midwest Ophthalmic to submit. Midwest Ophthalmic argues that its product will meet the IFB requirements, as it confirmed to the agency after bid opening. However, Midwest Ophthalmic does not dispute that the descriptive literature submitted with its bid showed that its product would not comply with the IFB required sphere range, a material solicitation requirement.

As explained in the prior decision, the responsiveness of a bid must be ascertained from the bid documents themselves, not from clarifications or discussions occurring after bid opening. See Orbit Advanced Technologies, Ltd., B-224603.2, Mar. 11, 1987, 87-1 CPD ¶ 273. Where, as here, descriptive literature, which was not solicited by the IFB but was submitted with a bid, raises questions as to whether the product offered complies with a material requirement of the IFB, the bid must be rejected as nonresponsive. Benthos, Inc.; Cygnus Eng'g, B-237454; B-237454.2, Feb. 20, 1990, 90-1 CPD ¶ 295. Here, Midwest Ophthalmic does not dispute that its submitted descriptive literature shows that its product would not comply with a material IFB requirement. We do not find material the fact that the descriptive literature may have been submitted in response to an "informal" request by the agency, since the literature was specifically made a part of Midwest Ophthalmic's bid and clearly showed that its product would not meet the IFB requirements.


Midwest Ophthalmic also contends that the descriptive literature submitted with its bid should be disregarded because this literature advised that it was subject to change in design and/or specification without advance notice. We disagree. As discussed in our prior decision, Midwest Ophthalmic expressly incorporated the submitted descriptive literature into its offered product and stated that it would provide equipment that met or exceeded the specifications attached to its bid. Since the descriptive literature incorporated into the bid evidences an intent not to meet a

^{1/} We stated that award may be made to Marco if the agency found that Marco was responsive and responsible and that Marco's bid price was reasonable.

material specification requirement, we do not think the disclaimer that it is subject to change without notice can reasonably be interpreted to mean that the bidder will modify the submitted literature to comply with the IFB requirements. See Arista Co., 53 Comp. Gen. 499 (1974), 74-1 CPD ¶ 34.

Midwest Ophthalmic also objects to our recommendation that the Army consider Marco's bid for award, asserting that there are various problems with Marco's bid and that Marco's price is significantly higher. We need not consider this issue since the agency has advised that it intends to cancel this solicitation and resolicit.

The request for reconsideration is denied.


for James F. Hinchman
General Counsel